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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TAYLOR MADE OFFICE SYSTEMS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

DAVID BORGEN
411 Airport Boulevard
Suite 100
Burlingame, California 94010

JAMES B. COPPESS
(Counsel of Record)
1925 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 728-2456

Counsel for Communications Workers of America, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REASONS FOR DENYING THE WRIT

In this case, Taylor Made Office Systems, Inc., challenges the refusal of the National Labor Relations Board (NLRB) to hold a hearing on Taylor Made's objection to an election in which its employees selected the Communications Workers of America as their exclusive bargaining representative. In its petition for certiorari, Taylor Made maintains that before the NLRB the employer "submitted evidence plainly sufficient to establish a prima facie case of unlawful conduct affecting the election, and it was an abuse of discretion for the Board to deny a hearing." Pet. 18; *see also id.* 19.

1. There is nothing in the National Labor Relations Act requiring the Board to hold hearings on objections to representation elections. Rather, "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). *See also NLRB v. Action Automotive Inc.*, 469 U.S. 490, 498 (1985). The NLRB's Rules, however, provide for a hearing where objections "raise substantial and material factual issues." 29 C.F.R. § 102.69(d) and (f). Thus, as Taylor Made has stated, the standard to be applied by the court of appeals in reviewing the Board's denial of a hearing is "the rule that an agency must generally apply its own rules in a manner that is not arbitrary, capricious, or an abuse of discretion." *NLRB v. ARA Services, Inc.*, 717 F.2d 57, 67 (3d Cir. 1983) (*en banc*). *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). *Cf. Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 159 at n.23 & 161 (1941).

Under the NLRA, 29 U.S.C. §§ 159(d) & 160(e) & (f), the courts of appeals have primary responsibility for reviewing the NLRB's disposition of representation disputes, as part of the appellate courts' authority to review the Board's unfair labor practice decisions. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964). Supreme Court intervention in this process is appropriate only "when the standard [of review] appears to have been misapprehended or grossly misapplied [by the court of appeals]." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). *See American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981).

Taylor Made does not contend that the court below "misapprehended" the standard of review. Indeed, that court followed *NLRB v. Advanced Systems, Inc.*, 681 F.2d 570 (9th Cir. 1982), which Taylor Made cites as "authoritative," Pet. 11. And the court focused on whether the employer had made out a prima facie case of misconduct sufficient to set aside the election, Pet. App.

D 3, which is the question Taylor Made says the court should have considered, Pet. 18-19.

Instead, Taylor Made asserts that the court below misapplied the standard by failing to fully appreciate the coercive impact of certain comments allegedly made by one employee to another prior to the election. Matters of this sort are generally not appropriate for Supreme Court review. As this Court has explained, the "usual rule" calls for "non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Comm'n v. Standard Oil Co.*, 355 U.S. 396, 400 (1958), quoting *Federal Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544 (1927).

This case thus falls within a category for which Supreme Court review is warranted in only the most extreme circumstances.

2. Taylor Made has not shown that the court below "grossly misapplied" the correct standard of review. Indeed, when the nature of the allegedly coercive incident on which Taylor Made relies is considered, it is apparent that the court of appeals' "appreciation of the circumstances" was exactly right, and that the NLRB did not abuse its discretion in denying a hearing.

An employer seeking to set aside a representation election because of alleged threats of violence "bears a heavy burden." *NLRB v. Herbert Halperin Distributing Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). The following principles apply in the consideration of such election objections:

> While the Board strives to maintain "laboratory conditions," *General Shoe Corp.*, 77 NLRB 124, 127; *YYK (USA), Inc.*, 269 NLRB 82 (1984), in reality these conditions are often "less-than-perfect." *See Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1005 (3d Cir. 1981); *NLRB v. Sumter Ply-*

> *wood Corp.*, 535 F.2d 917, 927 n. 15 (5th Cir. 1976), *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954). An election by its nature is a heated affair. Coercive conduct is never condoned during the election process, but the Board will not set aside an election unless an atmosphere of fear and coercion rendered free choice impossible. *Abbott Laboratories v. NLRB*, 540 F.2d 662, 667 (4th Cir. 1976); *Beaird-Poulan Div. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981). [The employer] must show by specific evidence "not only that improprieties occurred, but also that . . . they materially affected the election results." *Beaird-Poulan Div. v. NLRB*, 649 F.2d at 592. In making this determination, the status of those who made the alleged statements is relevant. [*Id.*]

The incident on which Taylor Made relies in challenging the CWA's election as the representative of its employees is described in the affidavit of Steve Burgess (attached as an appendix to this brief). Accepting as true all of the statements contained in the Burgess affidavit, it is apparent that the alleged incident could not have created "an atmosphere of fear and coercion render-[ing] free choice impossible." *NLRB v. Herbert Halperin Distributing Corp., supra*, 826 F.2d at 290.

Mr. Burgess states in the affidavit that, during a break at a pre-election union meeting, he approached Ray Bass, a fellow employee, to ask "what would happen if the union and the company could not agree on a contract, and the union then called a strike and the company replaced employees who went out on a strike." Mr. Burgess explains that he approached this particular employee, because "I have known Ray Bass for some time at work, . . ." According to the affidavit, Mr. Bass responded to the question by stating, "that's when the shotguns come out." When Mr. Burgess expressed surprise, Mr. Bass stated that he did not think the employer would let things go that far. According to Mr. Burgess, no other employee heard this exchange.

Taylor Made makes much of Mr. Burgess' statement that "[t]o the best of my recollection," Mr. Bass was one of six employees given special recognition by the union's speaker at the meeting for being part of the in-plant organizing committee. However, Mr. Burgess does not state that he approached Mr. Bass as a union representative. To the contrary, Mr. Burgess explains that he approached Mr. Bass as an acquaintance from work: "I have known Ray Bass for some time at work, so at a break in the meeting I sought him out to ask a question that had been bothering me." Indeed, the two men seem to have been friendly for some time, as Mr. Burgess notes that Mr. Bass had previously invited him on shooting trips. The meeting was addressed by Frank Tanner, who Mr. Burgess states "is known to me as an organizer and official of Local 9410." Yet, Mr. Burgess did not approach this official union spokesman with his question. Nor did he ask Mr. Tanner, or any of the other five employees on the in-plant committee, to refute or confirm the comments allegedly made by Mr. Bass.

Mr. Bass' comments were obviously not intended as a threat to the one employee who heard them. Mr. Burgess had asked for reassurance about what would happen if a strike occurred and "the company replaced employees who went out on strike." Mr. Bass allegedly responded with an ambiguous reference to "shotguns com[ing] out," but he also quite clearly stated that he did not believe any company-union dispute would go that far. Mr. Burgess has not said that he understood Mr. Bass to be threatening him, or that he found the conversation at all coercive. Indeed, Mr. Burgess' willingness to set the whole episode down in an affidavit for the employer's use in challenging the union's election would seem to indicate that he was not coerced.

In sum, Taylor Made's affidavit establishes nothing more than a conversation between two employees, during which one of them used some strong language—not as a

threat to the other employee, but as an expression of anger over an event he found unlikely to occur. That is not sufficient to overturn a representation election, and the Board, therefore, did not abuse its discretion in accepting the affidavit on its face but nevertheless rejecting Taylor Made's objection to the election.

3. In its attempt to manufacture a circuit conflict, Taylor Made cites four circuit court decisions, including one by the Ninth Circuit, for the proposition that "pre-election threats of violence in a future strike are sufficient grounds to set aside an election." Pet. 12. However, none of the cited decisions enunciates such a per se rule. Rather, each decision is based on a close consideration of the nature of the alleged threats, and the court's inferences concerning the likely effect of such threats in the circumstances presented by the particular case. As our brief review in the margin shows, each of the cited decisions involved threats of considerably greater force than the single, ambiguous conversation between employees at issue here.[1] Moreover, in each case the court

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[1] In *Hickory Springs Mfg. Co. v. NLRB*, 645 F.2d 506, 509 (5th Cir. 1981), pro-union employees repeatedly made threats during union meetings, in front of union officials who apparently acquiesced, about what would happen to "anyone" who crossed a picket line, and the union president echoed these threats in addressing a meeting. In *Loose Leaf Hardware, Inc. v. NLRB*, 666 F.2d 1036 (6th Cir. 1981), the union's business agent told a meeting that people who crossed its picket lines often had "accidents." *See Loose Leaf Hardware, Inc.*, 246 NLRB 350 n.3 (1979) (further describing this incident). In *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224, 238-239 (3d Cir. 1984), the court considered the "cumulative effect" of numerous threats of possible strike violence by union supporters and others, against the background of an incident of arson, "which indicated a willingness on the part of union partisans to use violence." And in *NLRB v. Advanced Systems, Inc.*, 681 F.2d 570, 575-577 (9th Cir. 1982), the union's "primary spokesman" threatened an employee with violence if he opposed the union, an act of vandalism befell another anti-union employee, and two union supporters threatened to "beat up with baseball bats anyone who tried to take their jobs away."

of appeals engaged in the same sort of concrete factual inquiry undertaken by the court below. There is thus no conflict between the approach taken by the court below and that of the four decisions cited by Taylor Made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID BORGEN
411 Airport Boulevard
Suite 100
Burlingame, California 94010

JAMES B. COPPESS
(Counsel of Record)
1925 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 728-2456

Counsel for Communications Workers of America, AFL-CIO

APPENDIX

APPENDIX

AFFIDAVIT OF STEVE BURGESS

COUNTY OF SAN FRANCISCO)
)
STATE OF CALIFORNIA)

I, Steve Burgess, having been sworn on my oath and under penalty of perjury, state as follows:

1. I live at 1525 East 3rd Street, Benicia, California, telephone number (707) 746-5454. I am employed at Taylor Made Office Systems as a Tech. Rep. II.

2. On or about September 21, 1981, I attended a union meeting called for Taylor Made employees by an In-Plant Committee for CWA Local 9410. The meeting was held at Carrows Restaurant in Oakland, California. Frank Tanner was at the meeting, and he is known to me as an organizer and official of Local 9410. During the meeting, Tanner addressed the audience and said that he wanted to recognize the people on the union's In-Plant Committee at Taylor Made, because they were the ones who were really responsible for contacting the union and organizing employees for the union. He then called out the names of six employees, and as each name was called, the employee stood and received some applause. To the best of my recollection, the following people were recognized in that manner: Greg Someson, Anthony Siller, Lee Pritchard, Matthew Cook, Patty Beltrame and Ray Bass. All those people are personally known to me as employees at Taylor Made.

3. I have known Ray Bass for some time at work, so at a break in the meeting I sought him out to ask a question that had been bothering me. I asked Bass what would happen if the union and the company could not agree on a contract, and the union then called a strike and the company replaced employees who went out on

strike. Bass replied, "that's when the shotguns come out." I was surprised at that statement and said something like, "are you serious? Would it really go that far? Would that really happen?" Bass replied that he didn't think that Barry would let it go that far, but if it did, "that's when the shotguns come out." His reference to "Barry" was Barry Taylor, the owner of Taylor Made. Bass's statements to me were made in a serious manner, and not in a joking way. To the best of my recollection, no one overheard our conversation.

5. I have known Ray Bass for almost two years and know that he is an avid gun collector. I have not seen his collection, but he has talked about it to me many times, and I have heard other employees talk about it. I also know that he goes shooting a lot, and has taken other employees with him. He has invited me to go shooting with him, but I have not been able to go.

5. I have carefully read this statement and have made all changes and additions necessary to reflect the whole truth. If called to testify to what I have said in this statement, I could and would do from my own personal knowledge.

/s/ Steve Burgess
STEVE BURGESS

Subscribed and sworn to before me
this 13th day of October, 1981.

/s/ Grace P. Stoneham
Notary Public